United States District Court
District of Massachusetts

Heng Ren Investments LP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No.**
Sinovac Biotech Ltd., et al.,	)	**19-11612-NMG**
	)	
Defendants.	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

This action arises out of a public investment in private equity transaction ("the PIPE transaction") in which nearly 12 million new shares of Sinovac Biotech Ltd. ("Sinovac" or "defendant") stock allegedly were issued and sold to two private investors affiliated with Sinovac's founder and Chief Executive Officer, Weidong Yin ("Yin"), at below-market price.[1] Plaintiff Heng Ren Investments LP ("Heng Ren" or "plaintiff"), a minority shareholder of Sinovac, contends that by engaging in the PIPE transaction, Sinovac and Yin breached their fiduciary duties and

[1] In a prior motion, Sinovac asserted that proper service had not been made upon Yin and that counsel for the company did not appear on his behalf. The pending motion likewise has been filed only on the behalf of Sinovac and no one has yet filed an appearance on behalf of Yin.

wrongfully diluted the shares of minority shareholders, divesting them of their rights.

Pending before the Court is Sinovac's motion for reconsideration of the denial, in part, of its second motion to dismiss the complaint (Docket No. 64). For the reasons that follow, that motion will be denied.

III. Procedural History[2]

Heng Ren filed this action in the Massachusetts Superior Court for Suffolk County in May, 2019. Sinovac timely removed the case to this Court and, after a half-dozen extensions of time, moved to dismiss the complaint on several grounds in September, 2020. That motion was predicated, in part, on the purported failure of Heng Ren to state a claim under Antiguan law, a subject with which the Court is unfamiliar and about which Sinovac failed to apprise it. As a result, the Court denied the motion without prejudice and instructed Sinovac that if it were to continue to invoke Antiguan law, it would need to proffer a more complete explication of the governing authority. Heng Ren I, 542 F. Supp. 3d at 68.

[2] The facts giving rise to this action have been recited by the Court at length on several occasions and it is unnecessary to reiterate them here. See, e.g. Heng Ren Invs. LP v. Sinovac Biotech Ltd., 542 F. Supp. 3d 59, 62-64 (D. Mass. 2021) ("Heng Ren I").

Obliging, Sinovac filed a second motion to dismiss in July, 2021, accompanied by a declaration from an expert on Antiguan law, Satcha S-C Kissoon, and exhibits consisting of several hundred pages of pertinent statutes, judicial decisions and excerpts from treatises. Heng Ren opposed the motion, proffering a declaration from its own expert, Leslie Thomas, and a similarly voluminous set of exhibits.

In March, 2021, the Court allowed the second motion to dismiss, in part, and denied it, in part, with the result being that Heng Ren's complaint was reduced to one count of wrongful equity dilution against Sinovac and Yin. Heng Ren Invs. LP v. Sinovac Biotech Ltd., No. 19-11612-NMG, 2022 U.S. Dist. LEXIS 38379 (D. Mass. Mar. 3, 2022) ("Heng Ren II"). Shortly thereafter, Sinovac moved for reconsideration of the denial of its motion to dismiss as to the wrongful equity dilution claim.

III. Motion for Reconsideration

A. Legal Standard

The Court has "substantial discretion and broad authority to grant or deny" a motion for reconsideration. Ruiz Rivera v. Pfizer Pharm., LLC, 521 F.3d 76, 81-82 (1st Cir. 2008). The United States Supreme Court has, however, cautioned that

> courts should be loathe to reconsider orders in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.

Lyons v. Fannie Mae, No. 18-10365-ADB, 2019 U.S. Dist. LEXIS 74006 at *6 (citing Christianson v. Colt Indus. Operating Corp, 486 U.S. 800, 817 (1988)) (internal punctuation omitted).

A motion for reconsideration should be allowed if the movant demonstrates 1) an intervening change in the law, 2) the discovery of new evidence or 3) a manifest error of law. Id. at *7. Mere disagreement with a judicial decision is not an adequate basis for reconsideration. Ofori v. Ruby Tuesday, Inc., 205 F. App'x 851, 852-53 (1st Cir. 2006). Nor is a motion for reconsideration the vehicle for a party to "undo its own procedural failures" or to advance arguments that should have been made prior to judgment. United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009). Reconsideration, in sum, is "an extraordinary remedy which should be used sparingly". Palmer v. Champion Mortg., 465 F.3d 24, 30 (1st Cir. 2006).

B. Application

Sinovac seeks reconsideration of the Court's ruling that Heng Ren has stated a direct claim for wrongful dilution under Section 204 of the Antigua International Business Corporations Act ("the IBCA"). It contends that since Heng Ren cannot allege a cognizable direct injury, its claim for wrongful dilution is derivative, rather than direct. Because derivative claims must be brought (at least initially) in the Antiguan courts, Sinovac submits that Heng Ren's wrongful dilution claim, which has not

been submitted to an Antiguan court, must be dismissed. See Sinovac Biotech Ltd. v. 1Globe Capital LLC, No. 18-10421-NMG, 2018 WL 5017918 at *6 (D. Mass. Oct. 15, 2018).

In support of that argument, Sinovac proffers a proliferation of case law from Canada and Delaware that purportedly shows that Heng Ren's claim is derivative, none of which it cited in previous pleadings. As explained in Heng Ren II, although the decisions of Canadian courts do not bind their Antiguan counterparts, at least one Antiguan court has remarked upon their persuasive value with respect to the interpretation of the IBCA due to the similarity of the IBCA and the Canadian Business Corporations Act ("the CBCA"). Heng Ren II, 2022 U.S. Dist. LEXIS 38379 at *12 (citing Marcus A. Wide and Hugh Dickson v. Amicus Curiae (ANUHCVAP2015/00039, Sept. 22, 2017) at para. 26) (noting that Canada is a jurisdiction "in which the unfair prejudice legislation is most developed"). With respect to Delaware, Sinovac notes that Massachusetts courts regularly find its law instructive as to corporate issues, citing MAZ Partners LP v. Shear, 204 F. Supp. 3d 365, 373 (D. Mass. 2016), an accurate observation the import of which is considerably reduced by its lack of relevance as to the question of whether Antiguan courts would find Delaware law similarly persuasive.

In Heng Ren II, the Court looked to Canadian precedent for guidance, specifically BCE Inc v. 1976 Debentureholders [2008] 3

S.C.R. 560 (Can.) a decision issued by the Supreme Court of Canada and proffered by plaintiff. Heng Ren II, 2022 U.S. Dist. LEXIS 38379 at *13-15. In consideration of that decision and the pleading standard of the Federal Rules of Civil Procedure, the Court concluded that Heng Ren had stated a direct claim under Section 204 for, at least, unfair disregard of its interests. See id. at *15.

Sinovac cited no persuasive authority instructive on the question of whether Heng Ren had stated a direct claim under Section 204, presumably because Sinovac relied at the time upon the argument that the IBCA mandated an Antiguan forum (and thus dismissal) regardless of whether a claim arising thereunder was direct or derivative. See Docket No. 46 at 10-11. In fact, rather than insist that Canadian or Delaware law directed a conclusion that the wrongful dilution claim was derivative, Mr. Kissoon opined that he and plaintiff's expert

> agree that it is possible for the High Court to determine that Heng Ren's claim of wrongful dilution gives rise to a direct cause of action under Section 204 of the IBCA against Sinovac and Mr. Yin.

Docket No. 56 at 2. Consistent with Sinovac, Mr. Kissoon concluded, however, that the distinction was immaterial because in either case the IBCA restricted jurisdiction to the High Court of Antigua and Barbuda. Id. at 2-5. As has been noted,

the Court rejected that conclusion. Heng Ren II, 2022 U.S. Dist. LEXIS 38379 at *6-11.

The pending motion is, in essence, a belated proffer of such authority which, Sinovac avers, demonstrates that claims for wrongful dilution brought under Section 204 are quintessentially derivative. Heng Ren disagrees but contends that, in any event, a motion for reconsideration is not the vehicle in which to present an argument that should have been developed earlier, citing Woo v. Spackman, 988 F.3d 47 (1st Cir. 2021).

The motion for reconsideration will be denied. Sinovac had ample opportunity to present any authority, Antiguan or otherwise, which it considered pertinent to either of its motions to dismiss. The dearth of Antiguan case law construing Section 204 was well known to the parties and their experts, and it was similarly foreseeable that, if the Court were to agree with Heng Ren that Section 204 did not mandate an Antiguan forum, its scope would be justiciable. In sum, Sinovac presents no compelling reason to excuse the tardiness of its argument and, in light of the declarations submitted by the experts and the unsettled state of Antiguan law concerning Section 204, has not demonstrated that the Court manifestly erred in concluding at Heng Ren has stated a direct claim for wrongful dilution.

IV. Motion for Certification under 28 U.S.C. § 1292(b)

Sinovac requests, in the alternative, that the Court certify its denial of the second motion to dismiss for interlocutory appeal and then stay this action. The Court declines to do so.

An otherwise unappealable interlocutory order may be certified for immediate appeal if the district court concludes that it

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

28 U.S.C. § 1292(b). A question of law is "controlling" if reversal of the order would terminate or significantly alter the action. Philip Morris Inc. v. Harshbarger, 957 F. Supp. 327, 330 (D. Mass. 1997).

The First Circuit Court of Appeals ("the First Circuit") does not, "as a general rule", grant interlocutory appeals from a denial of a motion to dismiss. Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) (dismissing order granting interlocutory appeal from order on motion to dismiss as improvidently granted and remanding to district court); see Toxics Action Ctr., Inc. v. Casella Waste Sys., 365 F. Supp. 3d 212, 214 (D. Mass. 2019) (citing Caraballo-Seda and denying motion for order under § 1292). Rather, such appeals are to be

granted sparingly and, in practice, are "hen's-teeth rare". Camacho v. Puerto Rico Ports Auth., 369 F.3d 570, 573 (1st Cir. 2004).

There is no reason to depart from that general practice here. It is true that this case poses certain questions of law which are difficult and in some respects novel. That fact, however, suffices only to put it in the company of a multitude of other actions pending in the federal district courts. It does not present the sort of exceptional circumstances warranting certification of an interlocutory appeal and, accordingly, Sinovac's motion will be denied. Caraballo-Seda, 395 F.3d at 9 (explaining that interlocutory certification should be used "only in exceptional circumstances").

ORDER

For the foregoing reasons, the motion of defendant Sinovac Biotech Ltd. for reconsideration or, in the alternative, for certification under 28 U.S.C. § 1292(b) (Docket No. 64) is **DENIED.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated June 29, 2022